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# AN EPISTEMOLOGICAL APPROACH TO CLASS CERTIFICATION: A CLASSY UNDERSTANDING OF THE PROBLEMS OF CLASS CERTIFICATION

Perhaps the most important aspect of class action litigation is the class certification process.<sup>1</sup> The primary difficulty with class certification is determining when a group of individuals constitutes a class. Any time separate, individual claims are aggregated, the possibility exists that any given litigant will lose autonomy and control over the discrete merits of his case.<sup>2</sup> As such, ascertaining when certification is appropriate for a group of litigants can be as formidable as it is complex.

Although the certification process presents many difficulties in any context, it is particularly troublesome and fraught with contradictory decisions in the mass tort area.<sup>3</sup> Mass tort claimants, unlike

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1. Other difficult aspects of class action litigation include selection of the representative and the appropriate counsel, the extent of court involvement in regulating litigation, and the amount of the fees awarded. These factors combine to make class action litigation difficult and costly for the litigants, the lawyers, and the courts. However, class action lawsuits are useful because "[s]eparate litigation of numerous similar claims entails enormous waste. Plaintiffs duplicate effort needlessly, consume a greater amount of scarce judicial resources than is necessary for a just resolution of their claims, and often force the defendant to juggle several suits in scattered forums." Note, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 HARV L. REV. 1143, 1144 (1983).

2. David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 561-62 (1987). This loss of control in joint adjudication also provides significant incentives for the litigants to eschew the class action in favor of bringing their claims separately. For example, "[m]any plaintiffs mistakenly perceive that, if the defendant's assets are limited or if multiple punitive damages may be barred, their best interests lie in a race to a quick recovery." *Class Certification*, *supra* note 1, at 1147-48. In addition, litigants who have substantial claims are deterred from using the class action. A litigant "whose claim is sufficiently large to justify litigation may incur few litigation costs if a defendant offers a substantial settlement shortly after the accident. And in class actions, plaintiffs with large claims will be constrained in negotiating settlements and in allocating any recovery by the duty to represent the entire plaintiff class." *Id.* at 1147. The resulting loss of focus on any one individual creates many competing interests among the claimants, the defendants, and the courts. Consequently, courts must carefully weigh and balance these interests when making a certification decision.

3. See *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990) (denying class

many other types of class claimants, tend to be very loosely connected with one another. This loose affiliation follows from the generally individualized nature of the claims, which often arise in completely different settings and at different times. Moreover, the individuality exacerbates the tensions which result from aggregating single claimants into a class. As a consequence, defining a class of mass tort claimants provides an especially useful vehicle for studying the nature of the certification process.

At present, the certification process is governed by Federal Rule of Civil Procedure 23.<sup>4</sup> Determining when a group of indi-

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certification on the basis that "the plaintiffs suffer from different diseases some of which are more likely to have been caused by asbestos than others"); *In re Federal Skywalk Cases*, 680 F.2d 1175, 1184 (8th Cir. 1982) (vacating certification even though the trial judge "certified the class based solely on his judgment that such action would best serve the interests of all parties involved"), *cert. denied*, 459 U.S. 988 (1982); *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 850 (9th Cir. 1982) (vacating certification because punitive damages to be awarded would differ among the jurisdictions), *cert. denied*, 459 U.S. 1171 (1983); *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 767-68 (9th Cir. 1977) (holding that "a class action brought on behalf of the next-of-kin of aircraft victims" is not certifiable); *McDonnell Douglas Corp. v. United States Dist. Court for the Cent. Dist. of Cal.*, 523 F.2d 1083, 1086 (9th Cir. 1975) (ruling that class certification may not be based on actions similar only in regards to damages), *cert. denied*, 425 U.S. 911 (1976); *Jenkins v. Raymark Indus., Inc.*, 109 F.R.D. 269, 281 (E.D. Tex. 1985) (granting certification for "insulation workers and household members alleging injuries from exposure to insulation products containing asbestos"), *aff'd*, 782 F.2d 468 (5th Cir. 1986); *In re Bendectin Prods. Liab. Litig.*, 102 F.R.D. 239, 241-42 (S.D. Ohio 1984) (granting certification for class of 700 people who were exposed to a drug in utero causing stillbirth or birth defects), *appeal dismissed sub. nom. Schreir v. Merrell Dow Pharmaceutical, Inc.*, 745 F.2d 58 (6th Cir. 1984); *In re Asbestos School Litig.*, 104 F.R.D. 422, 433-34 (E.D. Pa. 1984) (granting certification even though the class would be large, since the class action appeared to be a "superior" approach to "individual litigation"), *aff'd*, 921 F.2d 1310 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1623 (1991); *In re Three Mile Island Litig.*, 87 F.R.D. 433, 440-41 (M.D. Pa. 1980) (denying certification for the class comprised of those plaintiffs claiming physical injuries "linked with emotional distress" since each claim is "diverse and personal"); *Marchesi v. Eastern Airlines, Inc.*, 68 F.R.D. 500, 501-02 (E.D.N.Y. 1975) (denying certification since class actions are not the favored manner of disposition for mass accident liability, especially in cases of aircraft disasters); *Causey v. Pan Am. World Airways, Inc.*, 66 F.R.D. 392, 399 (E.D. Va. 1975) (denying certification due to the possibility of resulting complex conflicts of law questions, the inappropriateness of the resulting forum, and the better alternative of individual litigation); *Yandle v. PPG Indus., Inc.*, 65 F.R.D. 566, 570-71 (E.D. Tex. 1974) (denying certification since the class would have included employees suing an employer for different acts to different individuals over a ten year period); *Hobbs v. Northeast Airlines, Inc.*, 50 F.R.D. 76, 80 (E.D. Pa. 1970) (denying certification since forum inappropriate and individual litigation would be better suited to everyone's best interests).

4. Rule 23 provides for a class action when the following requirements are met:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to

viduals is similarly situated<sup>5</sup> enough to constitute a class requires not only the actual application of the provisions of Rule 23, but also a keen understanding of which characteristics among the group indicate a sufficient similarity to justify certification. More simply, Rule 23 contains general requirements of commonality, but the rule does not specify for courts which particular traits of the group or attributes of the questions or issues presented they should focus on during the certification process.

The Advisory Committee to Rule 23 acknowledged the dangers associated with granting class certification to loosely affiliated mass tort claimants in a note to Rule 23.<sup>6</sup> The Committee warned that mass torts are not appropriate for class action treatment due to

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the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

5. For the purposes of this paper, "similarly situated" refers to individuals who are related to one another by virtue of the nature of their claims and rights. The term has no reference to other areas of law.

6. The drafters wrote:

A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

FED R. CIV. P. 23 Advisory Committee's Note.

the perceived fact that the individuals are not related closely enough to be defined as a class.<sup>7</sup> To a large extent, the current disparities found in the judicial decisions regarding certification are the result of the disagreement about how to define a class for certification.

The purpose of this note is to examine the class definition process from a theoretical perspective. It begins by exploring the two primary justifications used by courts to permit class action litigation under the common law. These theories are known as the "community of interest theory" and the "common right theory."<sup>8</sup> Although these common law justifications for defining class litigation were thought to be eliminated with the emergence of the Federal Rules of Civil Procedure, this note argues that these justifications exist in the original Federal Rule of Civil Procedure 23 as well as amended Rule 23. The manner in which original and amended Rule 23 incorporate and rely on these justifications is central to understanding the differences in how courts conduct certification and whether certification will be granted to a particular group.

The original Rule 23 directly incorporated the community of interest and common right theories. The rule contained several subdivisions, each of which authorized a different type of class action.<sup>9</sup> As a result, the type of class action sought under the original rule determined the justificatory theory the court employed in determining whether the group constituted a class. Consequently, the original rule was grounded in both theories.

In contrast, amended Rule 23 attempts to describe, in very practical terms, situations or contexts appropriate for class action treatment. Each of the contexts is a different type of class. However, by providing these practical situations, amended Rule 23, unlike original Rule 23, lacks a clear theoretical basis for its existence

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7. See, e.g., *Yandle v. PPG Industries, Inc.*, 65 F.R.D. at 569 (noting that "[c]lass actions have had limited application in the past in mass tort cases, particularly due to the recommendation of the Advisory Committee on Rules").

8. The terms common right and community of interest are defined later in this note. See *infra* text accompanying notes 23-28. A number of other commentators and various courts also refer to these theories as the community of interest theory and the common right theory. Unfortunately, each person has understood these terms differently, and so, they may not translate precisely to other works and cases. Irrespective of the particular label, the content of these theories will be similar.

9. The different types of class actions determined the extent of the binding effect of the judgment.

and is, therefore, susceptible to construction according to either the common right theory or the community of interest theory depending on the particular theory of class certification subscribed to by the court.

After discussing the problems in class certification under Rule 23, this note discusses the epistemological foundation of the two theories. In examining how the community of interest and common right theories function, from an epistemological perspective, this paper argues that the presently perceived disparities shrink in importance. The result of such an analysis is a clearer, more coherent understanding of how class certification is conducted by the courts. In addition, this investigation will aid in determining what characteristics of a group are relevant and what the proper relationship among the group members ought to be before certification is appropriate.

Structurally, this note is divided into six sections. The first three sections explain the framework in which judicial decisions are made. The final three sections examine various case law decisions indicating the existence of the framework elucidated in the first half. In particular, Section One discusses the nature of a class action and its place in the common law.<sup>10</sup> Studying the role of a class action clarifies the objective of the process of defining what constitutes a class. This section describes the two basic judicial theories that developed as well as the development of Rule 23. Section Two closely analyzes how Rule 23 presently functions.<sup>11</sup> In Section Three, the theoretical difficulties created by the 1966 amendments to Rule 23 are explored.<sup>12</sup> Section Four analyzes judicial decisions regarding class certification of mass torts.<sup>13</sup> In particular, three provisions of Rule 23 are closely examined. Finally, Sections Five and Six explore epistemological problems associated with the current method of class definition and propose a uniform theoretical structure for defining a class.<sup>14</sup> The adoption of this theoretical structure will allow for a far greater coherence in the class certification process.

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10. See *infra* text accompanying notes 11-42.

11. See *infra* text accompanying notes 43-46.

12. See *infra* text accompanying note 47.

13. See *infra* text accompanying notes 48-112.

14. See *infra* text accompanying notes 113-31,

## I. DEFINITION OF A CLASS

Procedurally, one of the first steps in any class action is the class certification. Certification is the process by which the court determines when a group of individuals may litigate as a class instead of requiring them to bring individual actions. During this process, the court essentially defines the class. By applying a set of criteria to the group of individuals, the court imposes limits on what characteristics must be present in the group. In Federal court, these criteria are prescribed in Rule 23.

Rule 23's requirements, to a large extent, control the certification process by describing the elements necessary for class certification among a group of individuals. However, Rule 23 is broadly drafted, allowing courts to use two different theoretical approaches when applying and testing for the presence of the necessary elements. Simply, the objective wording of Rule 23 does not impose any particular conceptual approach on courts' certification analysis. This allows courts to determine the manner in which it will evaluate the group for the elements required by the rule.<sup>15</sup> Thus, the theoretical approach adopted by the court toward class definition governs how the criteria of Rule 23 are applied. Consequently, how class definition is understood is often determinative of whether

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15. Professor Simeone acknowledges the need to determine the manner in which the court evaluates the group of people seeking certification.

While the whole population may be said to be bound together by common interest, the common interest involved in class litigations must of necessity be a narrow and limited interest which will prove beneficial or adverse to the holders. While it is universally recognized that there must be community of interest among the members of the class, nowhere is that phrase defined or clarified. The statutory provision requires that the questions be one of 'common or general interest' to the persons who are many or too numerous to be brought before the court. These words, either standing alone or in context in the clause have been most perplexing. Does this requirement mean that parties must be 'united in interest' before it proper to bring the action in a representative form? Does the 'question' mean a question of fact or law? Does the code require that there must be a 'common' interest in the subject matter of the litigation or a 'common interest' in the object of the suit, or in the relief to be obtained? Must the interests of the various parties be joint or common or may they be separate and distinct interests, each person having a separate right of action or defense, but tied together by a common bond of fact or law? . . . The questions as such have never been considered by the courts, and the result has been confusion in determining the boundaries and meaning of 'question' and 'common interest.'

Joseph J. Simeone, Jr., *Class Suits Under the Codes*, 1955 WES. RES. L. REV. 5, 17 (1955).

certification is granted or denied.

Prior to analyzing the court's approach to class definition, an understanding needs to exist regarding why such a definition is actually needed. This will provide a structure in which to study how the court defines a group to be a class.

#### A. Common Law Adjudication and Class Actions

Before examining the theoretical aspects of the certification process, the role of the class action within the common law system of adjudication must be understood. One of the most basic precepts of the common law is that of individual justice.<sup>16</sup> In fact, the inviolability of person and property is perhaps the most fundamental tenet of the common law.<sup>17</sup> Within this notion of individual justice, a specific concept of adjudication exists. "Litigation is organized as a contest between two individuals or at least two unitary interests, diametrically opposed, to be decided on a winner-takes-all basis."<sup>18</sup> An example of the primacy of this concept is the amount of time and attention the tort system lavishes on each and every claim and the detail with which it tailors its remedy to the specific facts, the defendant's conduct, and the plaintiff's injury.<sup>19</sup> This notion of individuality permeates the law on a procedural as well as substantive level.

Class actions must be able to function within this individualistic litigation structure. Thus, some tension results in a class action since, at bottom, a class action is the antithesis of individual litigation; it is a means of aggregating separate, individual claims. In fact, its express purpose is to provide an efficient resolution of the same question or questions among many parties.<sup>20</sup> Resolving the

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16. See Roscoe Pound, *Do We Need a Philosophy of Justice*, 5 COLUM. L. REV. 339, 346 (1905) (stating that "the common law . . . is concerned, not with social righteousness, but with individual rights").

17. *Id.* at 342.

18. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976).

19. Rosenberg, *supra* note 2.

20. Such a device is unique in the common law, since historically, parallel claims brought by numerous plaintiffs usually could not be combined for adjudication. ZECHARIAH CHAFEE, JR., *SOME PROBLEMS OF EQUITY* 153 (1950).

Joseph Story argues that class action procedure is a direct descendant of English equity practice and bills of peace. He defines a bill of peace as a bill brought "to establish and perpetuate a right which he [the claimant] claims, and which from its nature may be controverted by different persons . . ." 2 JOSEPH STORY, *EQUITY JURISPRUDENCE* § 1173 (14th ed. 1918).



tension between a class action and the individual nature of the common law has led to the development of several theories which justify aggregating groups of people and their claims.<sup>21</sup> These justifying theories, referred to as community of interest and common right, recognize that there is no inherent right to litigate as a class in the common law.<sup>22</sup> To be certified as a class, the group must be defined in a judicially recognized manner, i.e., the class must contain the necessary characteristics demanded by either the common right or community of interest theories. Conversely, a court conducting a certification analysis will look for the presence of characteristics believed to be consistent with the particular theory chosen to justify class certification. As a result, the theory the court employs in the certification process defines the class, since the group must exhibit those traits upon which the specific theory focuses. In summary, the selection of the definitional approach controls the entire certification process by serving as the very explanation of why and how the group may be a class.

### B. Theories of Interest

Both the common right and community of interest theories recognize the individualist nature of common law adjudication. As a result, both begin with the premise that the greater the individuals' resemblance to each other, the less tension is generated between the aggregating principles of the class action and the individualist structure of the common law. Both theories attempt to define a class by identifying qualities which make the group cohesive. The common right and community of interest theories differ, however, in the cohesive traits deemed relevant and where those traits exist among the individuals.

The common right theory locates the binding interest or com-

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21. See *infra* text accompanying notes 23-28 (discussing, in detail, the development of the community of interest and common right theories).

22. Stephen Yeazell argues that the need to provide a justification for collective litigation may be traced to *Adair v. New River Co.*, 32 Eng. Rep. 1153, 1158-59 (Ch. 1805), in which the court specifically held that group litigation does not arise from social circumstances, but from judicial discretion as a matter of convenience. STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 184 (1987). He further proposes that this new understanding of collective litigation had two profound impacts on the modern class action. First, it provided precedent for the idea that whenever a group wants to sue, it must seek the court's determination of the appropriateness of collective litigation. *Id.* at 186. Second, the class of litigants are characterized as an interest class. *Id.*

mon characteristics in the actual right being asserted; "all members of the class must share 'one right' . . . ."<sup>23</sup> By focusing on the right, which all plaintiffs must exhibit, a court applying this theory conceives of "[c]lass litigation [as] affect[ing] class interests, not individual interests."<sup>24</sup> Each class members' possession of the very same right permits the aggregation and provides the cohesive force among the individuals. Thus, "[w]ith respect to [these] class interests, class members were 'homogeneous'; all stood 'in the same situation'."<sup>25</sup> This homogeneity allows the group to become a class.<sup>26</sup>

The essence of the common right theory is a qualitative approach to defining the class. It concentrates on the type of right asserted and not on a commonality among many traits. Each member of the group must assert the same kind of right against one or more defendants. It is the type or nature of the right of each individual plaintiff that determines whether they will be certified. When the group manifests rights which are not qualitatively the same, the common right theory requires that certification be denied for lack of cohesion among the individuals.

In contrast, the community of interest theory does not require the presence of a common right; it permits the individuals to have

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23. Note, *Developments in the Law — Class Actions*, 89 HARV. L. REV. 1318, 1331 (1976) (quoting C.C. Langdell, *A Brief Survey of Equity Jurisdiction (VII): Creditors' Bills*, 5 HARV L. REV. 101, 128 (1891)). An example of the common right theory was *Bromley v. Smith*, 57 Eng. Rep. 482 (Ch. 1826), cited in *Developments in the Law, supra* at 1333 n.15. The facts of *Bromley* were as follows:

Nine parishioners of a borough brought an action on behalf of all other parishioners against borough officials who had allegedly allocated funds inconsistently with their responsibilities under an Enclosure act. The defendants argued that the asserted misappropriation had been ratified by a majority of the parishioners, and thus that a suit challenging the appropriation could not be brought on behalf of the parishioners. Prior to enclosure, the rights had been in common, and the Enclosure Act, although altering the contents of those rights, evidently did not transform their nature. Sir John Leach, Vice Chancellor, held that, given the common right, the class suit was proper.

*Id.* The unifying element which allowed the group to proceed as a class was that each person was a tenant in common, and so, had the exact same right in the property as the other tenants in common.

24. *Developments in the Law, supra* note 23, at 1334.

25. *Id.*

26. Early endorsement of this theory came in *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 302-03 (1854), where the Supreme Court held that a group of methodist ministers representing a group of 1,500 people with rights to a fund managed by the church could maintain a bill in equity on behalf of themselves and others and that the judgment in such an action would bind the absentees. See YEAZELL, *supra* note 22, at 221-22 (discussing the *Smith* case).

separate and distinct rights. Under the community of interest theory, a group of individuals having separate and distinct rights can litigate as a class if they are united by a number of common attributes.<sup>27</sup> Here, the interest is found in the common questions of law and fact resulting from a common subject matter.<sup>28</sup> It is the subject matter which engenders a sufficient commonality among the group to make it cohesive enough to litigate as a class.

In contrast to the qualitative focus on the rights in the common right theory, community of interest has a more quantitative bias. Each member of the group cannot claim the exact right against the defendant, but the individuals must share a common nucleus of facts from which their rights are derived. The cohesion among the individuals is achieved through the existence of common questions of law or fact. The more common questions the group manifests, the more related and cohesive the group. Conversely, the fewer common questions, the more likely the presence of varying subject matters and the greater the likelihood individuals are asserting separate and discrete claims.

The qualitative and quantitative differences of the analyses of common right and community of interest are vital determinants in defining a class. The different manner in which the two theories justify and define a group as a class directly affects whether a court will grant or deny certification. As a consequence, the theories provide a foundation upon which Rule 23 functions.

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27. 1 JOHN N. POMEROY, EQUITY JURISPRUDENCE AND EQUITABLE REMEDIES, § 255 at 432-33 (3d ed. 1905). *Burke v. Illinois Bell Telephone Co.*, 109 N.E.2d 358 (Ill. App. 1952), illustrate the community of interest theory.

The Illinois Commerce Commission issued an order requiring the telephone companies to revise, print and distribute directories at least semi-annually. The Illinois Bell Company neglected to revise its directories for subscribers of telephones in Chicago and the suburban area. The plaintiff brought action on behalf of himself and all other subscribers who were similarly affected for damages which the court called a 'request for refund' under the provisions of the Public Utilities Act. Here is a situation in which hundreds of person have claims against the telephone company which is by law required to perform a particular act and has failed to do so. Each of the subscribers has a claim for reparation which could be determined in one action by means of the class device.

Simeone, *supra* note 15, at 29.

28. Roger H. Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 818 (1985) (noting that although the community of interest premise made class actions theoretically available for mass torts, there was no instance of a mass tort class action in 17th and 18th century England).

### C. Determination of Appropriateness of Class Treatment

The common right and the community of interest theories were incorporated directly into the original Rule 23 by its creation of different types of class actions referred to as "true,"<sup>29</sup> "hybrid,"<sup>30</sup> and "spurious."<sup>31</sup> The amended Rule 23 rejected this approach to defining classes and adopted an alternative approach much less complicated and less prone to error. However, amended Rule 23 did not eliminate the presence of the common right and community of interest theories as foundations for defining the class. Consequently, the courts are now free to follow either theory for defining a class, a situation which has led to uncertain application of the rule in practice.<sup>32</sup>

#### 1. Original Rule 23

Under the original rule, the court was required to focus on the character of the jural relationships among the group members in order to define a class. Jural relationships are formed among the individuals of a group as a result of their asserting certain rights. The interests that bind the group create the jural relationships. Original Rule 23 defined a class by the nature of the jural relationships.<sup>33</sup>

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29. Of the true class action, Professor Moore writes it "is one wherein, but for the class action device, the joinder of all interested persons would be essential. This would be in cases where the right sought to be enforced was joint, common, or derivative . . . ." 2 MOORE'S FEDERAL PRACTICE 2235 (1938), as quoted in John Keefe et al., *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327, 330 (1948).

30. A hybrid class action is appropriate where,

"[t]hough the class has a mutuality of interests in the question involved, still the rights of the members of the class are neither joint nor common; they are several. In addition to the question of fact common to all, there is, in lieu of joint or common interests, the presence of property which calls for distribution or management. This type of action is exemplified by a creditor's bill for the appointment of a receiver . . . ."

*Id.* (quoting 2 MOORE'S FEDERAL PRACTICE at 2239).

31. Professor Moore defines the spurious class suit in the following manner:

"This is a permissive joinder device. The presence of numerous persons interested in a common question of law or fact warrants its use by persons desiring to clean up a litigious situation. Assume that a railroad negligently sets fire to property, and widespread damage to many property owners ensues. Here is a questions of law or fact common to many persons . . . ."

*Id.* (quoting 2 MOORE'S FEDERAL PRACTICE at 2241).

32. See *infra* text accompanying notes 57-112.

33. JAMES W. MOORE, *FEDERAL PRACTICE AND PROCEDURE*, § 23.30 (2d ed. 1984).

There were three kinds of jural relationships: joint, common, and several.<sup>34</sup> From a determination of the kind of jural relationship existing among the group members, the court then determined the type of class existed. The type of class indicated the degree to which the judgment was binding on the class.<sup>35</sup>

A true class is premised on the common right theory, and a hybrid class is founded on a community of interest theory, but only as applied to a single piece of property. By requiring the presence of a common property, the courts were able to ensure the rights of each member were nearly exactly the same.<sup>36</sup> Thus, the original Rule 23 essentially was a derivation of the common right theory.<sup>37</sup> Consequently, original Rule 23 required the court to analyze carefully the quality or type of rights being asserted and, moreover, it limited the binding effect of the class depending on which theory defined the class.<sup>38</sup>

## 2. Amended Rule 23

The qualitative analysis of the jural relationships proved difficult for courts to apply. The Advisory Committee, which drafted the amendments, wrote that "[i]n practice the terms, 'joint,' 'common,' etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain . . . . The courts had considerable difficulty with these terms."<sup>39</sup> The amendments to the rule

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34. *Id.*

The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved . . . . It was thought that the definitions accurately described the situations amenable to the class suit device, and also would indicate the proper extent of the judgment in each category.

35. *Id.*

36. Note, 31 ALB. L. REV. 127, 128-29 (1967) (noting that a hybrid judgment only bound class members of the certain property); see also Note, *Procedural Devices For Simplifying Litigation Stemming From a Mass Tort*, 63 YALE L.J. 493 (1954) (discussing the development of class actions in situations involving a common fund or property).

37. Although the spurious class rested on the community of interest theory of class actions, it was not, in effect, a class since its binding effect only extended to those who consented to the action. *Id.* at 510 ("In substance, the spurious class action is merely a provision for permissive joinder of parties — an invitation to those wishing to enter an action to do so.").

38. Keefe, et al., *supra* note 29, at 330 (concluding "[t]he classification which the rule Rule 23 [sic] makes is dependent upon the jural relationships of the members of the class").

39. Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 39 F.R.D. 73, 95-98 (1966) (Report of the Judicial Conference of the United States with the Advisory Committee's Notes on the proposed rules). Although the Advisory Committee Notes appear to reject the use of jural relationships as determinative in

were an attempt to provide a much more practical approach to defining a class.

Amended Rule 23 requires a court to apply a different standard than character or quality of jural relationships. A court applying amended Rule 23 must examine the nature of the claim or the context in which the group is asserting rights to define the class.<sup>40</sup> After satisfying the initial requirements of Rule 23(a), the group may proceed under one of the contexts of subdivision (b). Subdivision (b) describes three broad situations in which a group may assert rights as a class.<sup>41</sup> By including this second level requirement, the drafters intended to describe "occasions for maintaining class actions."<sup>42</sup> Describing the contexts in which class certification is appropriate eliminates the extensive qualitative analysis required under the original rule. However, this change in the rule also has the corresponding effect of returning some discretion to courts to decide upon which theory to premise the class definition. In other words, courts may examine a class for satisfaction of the amended rule's requirements within either the common right or community of interest framework.

## II. APPLICATION OF RULE 23 AND CLASS DEFINITION

Rule 23 begins with a general definition of class actions contained in subsection 23(a) followed by three subcategories found in

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defining a class, a closer reading indicates that the committee rejected the qualitative approach. The drafters' concern is essentially focused on the practical problems which arise in understanding what type of rights are present. The comments devote three full paragraphs to a discussion of the various interpretational difficulties. The comments do not argue that the jural relationships are ineffective at defining the class. Instead the amendments attempted to provide a different, more qualitative approach. *Id.* at 98-107.

40. *Id.* at 99. The Committee further writes "[t]he amended rule describes in more practical terms the occasions for maintaining class actions . . . ." *Id.* Additional indication that a court considering a motion for certification must make findings regarding the unity of the group when applying amended Rule 23 exists where the Committee describes the various factors under subdivision (b)(3) relating to desirability of certification. The notes state "these interests [contained in subdivisions (b)(3)(A)-(D)] may be theoretic rather than practical: the class may have a high degree of cohesion and prosecution of the action through representatives would be unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable." *Id.* at 104. The basic thrust of these comments indicates that the amended rule only describes situations or contexts in which class certification is appropriate. The court must supply its own test for finding the unity and cohesion among the group.

41. *Id.* at 100 ("Subdivision (b) describes additional elements which in varying situations justify the use of a class action."). See *supra* note 4 for text of amended Rule 23(b).

42. *Id.* at 99.

subsection 23(b). Section 23(a) specifies four prerequisites for all class actions. These are (1) that the parties be too numerous for individual joinder, (2) that common questions of law or fact exist within the group, (3) that the group representatives have claims or defenses typical of the class, and (4) that the representatives be able to adequately represent the group's interests.<sup>43</sup>

Subsection (b) is divided into three classifications or contexts. After satisfying subsection (a), a particular category of subsection (b) must be satisfied. Rule 23(b)(1) is essentially an expanded version of the joinder provisions in Rule 19, since it covers situations in which all parties should be joined in order to render a complete decision. Rule 23(b)(2) is intended to cover those situations in which the group seeks injunctive or declaratory relief. Finally, Rule 23(b)(3) describes situations in which there are common questions of law and fact making a class action the most fair and efficient means of pursuing judgment.

The prerequisites of subsection (a) are used initially to define the group, and the requirements under subsection (b) provide a vehicle for certifying different types of classes depending on the circumstances.<sup>44</sup> Unlike original Rule 23, the amended rule does not require courts to engage in qualitative jural relationship analysis to determine which type of class is appropriate, and, as a result, the binding effect of the judgment which depended on the jural relationship under the original rule.<sup>45</sup> The Advisory Committee Note to subdivision (b) provides that "all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class . . .".<sup>46</sup> Jural relationships, however, are still relevant to class definition. Amended Rule 23 simply allows a court to choose which theory, the common right or community of interest, is appropriate for defining the class.

### III. PROBLEMS WITH PRACTICALITY

Although the amended rule's elimination of qualitative analysis of jural relationships makes the rule more practical,<sup>47</sup> it creates a

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43. FED. R. CIV. P. 23.

44. FED. R. CIV. P. 23(a) & (b), Advisory Committee's Note.

45. FED. R. CIV. P. 23, Advisory Committee's Note (stating that the original rule contained defined categories of class actions which "in practice . . . proved obscure and uncertain").

46. FED. R. CIV. P. 23, Advisory Committee's Note (1966 Amendment).

47. *Id.* ("The amended rule describes in more practical terms the occasions for main-

theoretical vacuum in which the courts are to operate. This gap results because amended Rule 23 gives a court leeway to use either theory for class definition without clearly defining which theory it is in fact using. In the original rule, the common right and community of interest theories were written into the rule. Consequently, the nature of the rights asserted by the group determined which theory the class was based upon. The value of the original rule was that a particular class was, by operation of the rule, grounded in one theory or the other.

#### IV. ANALYSIS OF THE JUDICIAL DECISIONS

Analyzing the theoretic difficulties described above under each part of Rule 23, although possible, would be lengthy and repetitive. Consequently, only selected provisions of the rule are explored through the vehicle of mass tort case law.<sup>48</sup> Specifically, this note explores the commonality requirement of subsection (a)(2),<sup>49</sup> the predominance requirement of subsection (b)(3),<sup>50</sup> and subsection (b)(1)(B), the "limited fund" class action.<sup>51</sup>

The problems resulting from Rule 23(a)(2), (b)(3) and (b)(1)(B) are representative of the theoretical difficulties present throughout the rule. These difficulties are the result of courts' freedom to adopt either the common right or community of interest theory of class definition when considering a motion for class certification.<sup>52</sup>

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taining class actions . . . .").

48. Mass tort cases are useful for examining Rule 23 because of the unique nature of the mass tort. Under the amended rule, a court considering a motion for certification is able to use either the common right theory or the community of interest theory, sometimes with different outcomes. *See supra* note 3 and accompanying text. Thus, these cases tend to exaggerate the lack of theoretical grounding now present in Rule 23.

49. FED. R. CIV. P. 23(a)(2) provides, in part: "One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (2) there are questions of law or fact common to the class . . . ."

50. Under subsection (b)(3), a class action may be maintained if the prerequisites of 23(a) are satisfied, and "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3).

51. Under subsection (b)(1)(B), a class action may be maintained if the prerequisites of 23(a) are satisfied, and allowing separate actions would create a risk of "adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests . . . ." FED. R. CIV. P. 23(b)(1)(B).

52. While any provision of the rule could be used for study, the corresponding rele-



### A. Commonality: 23(a)(2)

The judicial confusion created by the lack of a coherent approach to class definition appears in the evaluation of commonality in Rule 23(a)(2). Read literally, this provision simply requires that the group seeking certification demonstrate the presence of common questions of law and fact among the individuals.<sup>53</sup> A finding of common questions of law and fact is possible under either the common right or community of interest theories. Under a common right approach, the fact that each individual member of the group is able to assert a common right creates a series of common questions. Common questions also appear under the community of interest approach. This theory actually defines the class by means of the common questions existing among the plaintiffs in relation to the defendant.

As in the limited fund class action,<sup>54</sup> the definitional theory used by the court in examining this provision often determines whether the requirement is fulfilled. Rule 23's lack of a coherent theoretical approach to class definition manifests itself in the varying types of tests the courts devise and apply to the groups in certification evaluation.<sup>55</sup>

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vant cases would not contain enough discussion regarding the community of interest and common right theories to permit solid conclusions due to the nature of the issues present in non-tort cases. For example, in a shareholder's derivative suit brought as a class action, the nature of the rights are so closely related that certification would follow under both the common right and community of interest approaches. Consequently, the discussion related to certification in such a case would generally not contain enough information regarding which theory the court applied to grant certification. Thus, although the lack of theoretical grounding in the amended rule's provisions does not disappear, the court's basis for certification is obscured by the quality of the asserted rights.

53. FED. R. CIV. P. 23(a)(2).

54. FED. R. CIV. P. 23(b)(1)(B). The limited fund class action is triggered where separate actions "create a risk of . . . adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest . . . ." *Id.* Professor Transgrud notes that the limited fund situation occurs where the defendant may not be able to satisfy all of the claims brought by an individual plaintiff due to insufficient assets. Transgrud, *supra* note 28, at 794-95. The class action thus "protects the interests of all claimants to the limited fund by preventing its disbursement on a first-come, first-served basis." *Id.* at 795 (citations omitted).

55. For a discussion noting the importance of providing a clear analytic structure when applying Rule 23, see *Developments in the Law*, *supra* note 23, at 1330 (1976). "The various issues which class actions raise cannot be fully analyzed unless the connections among the issues are explored. Some overarching conceptual framework is a necessary prerequisite to an understanding of these connections." *Id.*

In evaluating a group for commonality under Rule 23(a)(2), the central issue facing the court is where to find the common questions. The test used by the court to review the group for the presence of common questions of law and fact belies its theoretical approach. Consistent with the existence of the two primary theories for class definition, the cases can be separated into two distinct categories of review which correspond to the common right and community of interest theories. These categories are referred to here as the "close" review, indicating the use of the common right theory, and the "liberal" review, correlating with the community of interest approach.<sup>56</sup>

### 1. Close Review

Courts following this type of review focus closely on the individual members of the group, rather than on the group as a whole. Such attention to the individual members of the class is indicative of the common right theory, which requires that each individual in the group be able to assert the same right as any other individual. This "close" review for commonality was used by the court in the Dalkon Shield litigation.<sup>57</sup>

The *Dalkon Shield* case involved certification of both a nationwide punitive damages class and a California statewide liability class of plaintiffs alleging injuries from use of the Dalkon Shield intrauterine device.<sup>58</sup> Regarding the statewide liability class, the Ninth Circuit agreed with the district court that commonality was present concerning the issues "of design, testing, manufacturing, labeling and inspection of the Dalkon Shields."<sup>59</sup> However, the circuit court went on to state that commonality did not exist, and certification was denied regarding "issues of negligence, strict products liability, adequacy of warnings at relevant time periods, breach of warranty, [and] fraud and conspiracy . . ."<sup>60</sup> In its reasoning, the court expressed concern that "[d]ifferent questions of law and

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56. These terms are not meant to refer or relate to other works or terms from other areas of the law. Any similarity between their meanings as defined in this paper and other works is coincidental.

57. *In re Northern Dist. of Cal., Dalkon Shield IUD Lib. Litig.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

58. *Id.* at 848. Certification of the class for the nationwide action on the issue of punitive damages was determined pursuant to Rule 23(b)(1)(B) and for the statewide action on the issue of liability was determined pursuant to Rule 23(b)(3). *Id.*

59. *Id.* at 854 (quoting the district court, 526 F. Supp. 887, 900 (1981)).

60. *Id.*

fact could apply to various plaintiffs . . . ."<sup>61</sup> In essence, there were many rights involved and all the plaintiffs could not assert the same rights.

Similar to the district court, the circuit court used the same approach of concentrating its analysis on the individual members of the group while evaluating the punitive damages class.<sup>62</sup> The court held that questions regarding the defendants' knowledge of the product's safety risks, information kept from the public, and information contained in the defendants' advertising were not common to all plaintiffs.<sup>63</sup> As in the liability class analysis, the court's examination focused on individual plaintiffs, and because the court found that each plaintiff could not claim the same rights as all others, commonality was not found.<sup>64</sup>

This close scrutiny of the nature of the rights each individual member of a potential class asserts suggests the application of the common right theory. The common right theory requires the court to examine carefully the individual rights asserted to insure they are the same. If all rights are not the same, commonality is not present. In contrast, the community of interest theory allows a court to determine whether questions common to all of the claimants are predicated on a common nucleus of operative facts. Focusing on operative facts in the *Dalkon Shield* case may have permitted a finding of common issues, including negligence. Consequently, although Rule 23(a)(2) appears objective, the manner in which a court understands and defines a class determines the characteristics which the group must exhibit to be granted certification.

*Ryan v. Eli Lilly & Co.* is another example of close judicial review.<sup>65</sup> This case involved class certification of a group of females injured by their mothers' use of Diethylstilbestrol (DES) during pregnancy. The court conducted the Rule 23(a)(2) analysis simultaneously with the predominance analysis under Rule 23(b)(3), indicating that the sole difference between the two was one of stringency.<sup>66</sup> The standard is essentially the same for both provisions, except that Rule 23(b)(3) commonality requires predomi-

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61. *Id.* (noting that "different representations and warnings [were] made to each woman, different injuries suffered, and different defenses [were] available to [the defendant]"). *Id.*

62. *Id.* at 850.

63. *Id.*

64. *Id.*

65. 84 F.R.D. 230, 232-33 (D.S.C. 1979).

66. *Id.* at 231.

nance of common questions.<sup>67</sup> The court held that individual issues did not predominate and that commonality deficiencies in liability issues could not be cured because "individual proof as to each party . . ." was required.<sup>68</sup> The court went on to explain that evidence of causation also prevented a finding of commonality because "so much in the way of individual proof by each of the class members will obviously be required."<sup>69</sup>

As in *Dalkon Shield*, the *Ryan* court's certification analysis focuses on the individual members of the group. The concern with individualized proof is consistent with the fact that the members of the group do not share a common right. The need to demonstrate a high degree of individual proof reflects the lack of a common right. Rights which are several and distinct prevent a finding of commonality under a common right approach.

The demand for individualized proof is consistent with the community of interest theory. This approach considers the common questions arising from the subject matter rather than the rights themselves. Consequently, individualized proof poses no threat to class certification when the court is applying the community of interest approach.

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67. One treatise describes the relationship of these two subdivisions as follows:

[A]n action is maintainable under Rule 23(b)(3) only if there is a finding that common questions predominate over individual issues. Since this obviously is a more stringent standard than that prescribed by Rule 23(a)(2), subdivision (a)(2) would be satisfied any time the court finds that subdivision (b)(3) test has been met. Not surprisingly, therefore, a few courts in actions brought under subdivision (b)(3) have not drawn a distinction between the two requirements. They either have dealt with the common-issue question simultaneously with their inquiry into whether common questions predominate or have assumed that Rule 23(a)(2) was satisfied and thought it necessary only to rule on the question whether the suit fit within subdivision (b)(3).

7A CHARLES A. WRIGHT, ET AL., *FEDERAL PRACTICE AND PROCEDURE*, § 1763 at 227-28 (2d ed. 1986).

This simultaneous analysis is not suggested by the rule, however. The provisions of Rule 23 are clearly divided between subsections (a) and (b), which suggests the evaluation of commonality under (a) should be distinct from that under (b). In fact, although noting that some courts consider (a)(2) and (b)(3) together, Professors Wright and Miller suggest that the provisions are to be considered separately.

What is clear, however, is that it is not sufficient that common questions merely exist, as is true for purposes of Rule 23(a)(2), and that the court is under a duty to evaluate the relationship between the common and individual issues in all actions under Rule 23(b)(3).

*Id.* § 1778.

68. *Ryan*, 84 F.R.D. at 233.

69. *Id.*

## 2. Liberal Review

Class certification under liberal review suggests a community of interest approach as opposed to common right. Under the community of interest approach, a broader approach to commonality is manifested by the nature of the court's examination. In *Jenkins v. Raymark, Industries, Inc.*,<sup>70</sup> the court, analyzing commonality under Rule 23(a)(2), certified a class of plaintiffs claiming injuries from asbestos. The court held that common issues

include the questions of when the asbestos manufacturers and distributors became aware or should have become aware of any health risks associated with the use of asbestos products; what steps, if any, they took to ameliorate the risks; and whether or not their actions in ameliorating the risks or failing to ameliorate the risks warrant the imposition of punitive damages.<sup>71</sup>

The importance of the court's inquiry lies in the type of questions asked of the members of the putative class.

In *Jenkins*, the examination turned on whether the issues themselves were common to the group and not simply the rights claimed by particular individuals. The court held that "[c]ertification of a class of pending asbestos-related personal injury suits allows the trier of fact the opportunity to resolve the 'state of the art' issues in one trial . . . ."<sup>72</sup> The court's clear concern was that commonality result from the issues instead of the rights asserted by individuals.

While the focus of the common right approach is the individual, the community of interest approach examines the issues themselves and the subject matter of the case. Even though the questions must still be common to the group to satisfy Rule 23(a)(2), the commonality may result from varying underlying fact patterns. In a common right approach the underlying facts must be exactly the same to give rise to a common right, and in turn, fulfill the requirements of commonality. Consequently, the approach the court uses in applying the prerequisites of Rule 23(a)(2) determines where the commonality is located.

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70. 109 F.R.D. 269, 271-72 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986).

71. *Id.* at 271.

72. *Id.*

Another difference created by a community of interest approach is that the amount of commonality necessary to satisfy Rule 23(a)(2) appears to be diminished. In *Axelrod v. Saks & Co.*,<sup>73</sup> the plaintiffs, a group of charge account customers of the defendants, alleged anti-trust violations seeking treble damages.<sup>74</sup> Discussing the Rule 23(a)(2) requirement, the court held "not every question of fact and law must be common to every member of the class."<sup>75</sup> This lower threshold of commonality was also approved in *Jenkins*.<sup>76</sup>

A court employing a community of interest approach defines the class through common questions. The common questions arise from similar, although somewhat varying fact patterns. The typical standard for fact patterns requires a nucleus of operative fact. Slight individual variations do not preclude certification with community of interest. By contrast, common right theory requires the rights of each individual to be exactly the same. Achieving a level of common rights requires nearly all of the underlying facts to be the same for all the individuals. Deviations in the facts lead to distinct and several rights, thus preventing class definition, and by extension, class certification.

The differences between courts employing the close review and those using the liberal review may result from other factors. In some instances, the courts may simply have devised different tests to determine when the requirements for Rule 23(a)(2) have been met according to interpretational differences unrelated to class definition. The court may be concerned with other factors to some extent, however, each of the courts employing the restrictive test also express concerns about the cohesiveness of the group seeking certification. This concern for class definition, more than mere interpretational differences, appears to drive the analysis under the restrictive test.

Moreover, the different results reached among the jurisdictions concerning which test to employ appear to divide into two factions.

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73. 77 F.R.D. 441 (E.D. Pa. 1978).

74. Although an anti-trust action is not directly analogous to a mass tort situation, the theories of class definition still apply. Generally, the effects associated with class definition theory are more pronounced and easier to describe in the mass tort context. The effects, however, are present in all class actions.

75. *Id.* at 444 (quoting *Fox v. Prudent Resources Trust*, 69 F.R.D. 74, 78 (E.D. Pa. 1974)).

76. *Jenkins*, 109 F.R.D. at 272 (explaining that the commonality requirement "does not mandate that all issues be common, only that common issues exist").

If the courts are concerned about other factors, more than two standards would likely arise. Since two tests arise in the opinions and indicate two distinct standards, claiming other factors are responsible for the differences in the decisions and tests implies the relationship of the theories to the decisions is merely coincidental. Such a coincidence seems unlikely, especially given the fact that the differences occur in a number of provisions of Rule 23. Although other factors could account for some of the disparities, the fact that two distinct theories emerge and each court expressed concerns regarding the cohesiveness of the group, the decisions reflect the court's choice of either the common right or community of interest theory to class certification.

### B. Predominance: 23(b)(3)

Motions to certify classes in mass tort cases are most common under Rule 23(b)(3).<sup>77</sup> This provision contains two explicit requirements: that the court finds that common questions predominate and that the class action is the superior method of adjudication given the specific situation.<sup>78</sup> Courts tend to focus on the commonality factor. Presumably, if common questions predominate, the class action will be the superior method of adjudication.<sup>79</sup> Yet, Rule 23(b)(3) fails to answer the central question of *how* a court

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77. *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986); *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1985); *In re Agent Orange Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983); *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982); *In re Three Mile Island Litig.*, 87 F.R.D. 433 (M.D. Pa. 1980); *Yandle v. PPG Indus., Inc.*, 65 F.R.D. 566, 572 (E.D. Tex. 1974).

78. FED. R. CIV. P. 23(b)(3). The predominance analysis under (b)(3) is aimed at ensuring that the class action is appropriate. It is thus a more stringent standard than found in subsection (a)(2), which is merely a prerequisite. See *supra* note 67 and accompanying text. Consequently, although the predominance and commonality requirement tend to focus on the same general characteristics, common questions of law and fact, their purposes are very distinct. Rule 23(a)(2) is merely a prerequisite while subsection (b)(3) exists as a safeguard against certifying a class where the group is not cohesive enough to justify such treatment. MOORE, *supra* note 33, § 23.45[2].

79. 7A WRIGHT, et al., *supra* note 67, § 1777 (A finding that common questions [in a Rule 23(b)(3) action] predominate insures that the claims of the class members "will be sufficiently similar so that adjudication by representation will be appropriate.") (citations omitted) (emphasis added). The attempt to achieve a balance between individual actions and collective litigation is the basic conflict involved with class definition. If the court finds adequate commonality for the group to constitute a class, individual resolution, although possible, becomes an inferior method of adjudication.

The predominance test may also be used to delimit the proper scope of the action under subdivision (c). Subdivision (c) permits separating common issues from the action as a whole for class action treatment. FED. R. CIV. P. 23(c).

should decide whether the parties are sufficiently similar to adjudicate as a class. The manner in which the court defines commonality, either through a community of interest or common right approach, is determinative of whether a class will be certified under Rule 23(b)(3).

In making their decisions under this provision, courts generally employ a pragmatic balancing test.<sup>80</sup> Under this test, common questions need not resolve all of the issues being litigated.<sup>81</sup> Professors Wright and Miller summarize the pragmatic balancing test in the following manner:

The common questions need not be dispositive of the entire action. In other words, "predominate" should not be automatically equated with "determinative" or "significant." Therefore, when one or more of the central issues in the action are common to the class and can be said to predominate, the action will be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately.<sup>82</sup>

The pragmatic balancing test weighs the common questions and the individual questions. However, it does not determine which characteristics of the group of individuals a court should explore to determine if common questions predominate. The court is left to approach the test from either the common right or community of interest perspective. The approach the court takes in applying the pragmatic balancing test to assess whether common questions pre-

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80. See WRIGHT et al., *supra* note 67, § 1778, at 552 (discussing the tests used by courts to determine whether common questions predominate over individual issues). Other tests are available for determining when predominance is present. For example, some courts use a time-comparison test. However, this test has fallen into a degree of disfavor. It involves determining whether the amount of time spent litigating the common questions will exceed that amount of time spent on individual issues. See, e.g., *Payton v. Abbott Labs*, 83 F.R.D. 382, 391 (D.C. Mass. 1979), *vacated on other grounds*, 100 F.R.D. 336 (1983). Professor Moore notes that "[a] quantitative test, comparing the amount of time and attention required for settlement of the common questions with that needed to conclude individual matters, has properly been rejected as a measure for this element of a (b)(3) action." MOORE, *supra* note 33, § 23.45[2]. Professor Moore also discredits the outcome determinative test. Under this test, courts "find[] 'predominant' those common questions whose determination would conclude the mass of disputes." *Id.* Professor Moore is dissatisfied with the outcome determinative test, which applies criteria similar to those used to assess the finality of a judgment and thus "would essentially substitute 'significant' for 'predominant.'" *Id.*

81. *Jenkins*, 109 F.R.D. at 278 (quoting 7A WRIGHT, et al., *supra* note 67, § 1777).

82. 7A WRIGHT, et al., *supra* note 67 § 1778; see also *Jenkins*, 109 F.R.D. at 278.



dominate largely determines whether or not certification will be granted to the group. Where a court uses the community of interest theory in applying the pragmatic balancing test, certification is granted to the group. In contrast, courts which apply a common rights approach in conjunction with the pragmatic balancing test do not grant certification.

For example, in *In re Asbestos School Litigation*,<sup>83</sup> the court approached the pragmatic balancing test from the community of interest perspective. In particular, the court focused on questions arising from a common nucleus of operative fact.<sup>84</sup> The plaintiffs alleged six claims for damages, "negligence, strict liability, breach of warranty, intentional tort, concert of action and civil conspiracy."<sup>85</sup> The court noted that these claims arose "out of the same common nucleus of operative facts relating to defendants' conduct and the nature of asbestos products."<sup>86</sup> On the issue of causation, the court held "there is no reason . . . why proof of [causation] cannot be made on a common basis so long as the common proof adequately demonstrates some damage to each individual."<sup>87</sup> Moreover, the court held that the legal issue of proximate causation "can be resolved on a classwide basis without involving individualized, class-member by class-member proof."<sup>88</sup> This finding would not have been possible under a common right approach. A finding of predominance is possible only from the community of interest approach, since the interest which binds the group is the common subject matter.

By focusing on the questions which arose from a common nucleus of operative facts, the court found a predominance of common questions.<sup>89</sup> Applying the pragmatic balancing test in this

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83. 104 F.R.D. 422 (E.D. Pa. 1984). This case was an a mass toxic tort resulting from asbestos. The plaintiffs asserted no right common to each of them. Instead, each was injured separately. However, the court found sufficient cohesion for class definition under the community of interest theory.

84. *Id.* at 431-32. This standard, requiring a common nucleus of operative fact, is "very similar to that used to determine the application of the doctrine of pendent jurisdiction." 7A WRIGHT, et al., *supra* note 67, § 1778.

85. *Asbestos School Litig.*, 104 F.R.D. at 432.

86. *Id.*

87. *Id.* (quoting *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 454 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) (emphasis omitted)).

88. *Id.* at 432. The ability to determine damages on a classwide basis has been disputed in the past. 5 HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS, § 8824(b), at 879 (1977). The question now appears to be resolved.

89. *Asbestos School Litig.*, 104 F.R.D. at 432.

manner is consistent with the community of interest theory, which probes the group on the level of common questions and not on the level of common rights.

In contrast, courts that have not found a predominance of common questions of law or fact apply the pragmatic balancing test from the common right perspective of class definition. Decisions which deny class certification discuss the individual members of the group instead of concentrating on the subject matter of the claims. *In re Fibreboard Corporation*<sup>90</sup> involved class certification of a large group of plaintiffs claiming injury from asbestos. Discussing the element of causation, Judge Higgenbotham opined:

A contemplated "trial" of the 2,990 class members without discrete focus can be no more than the testimony of experts regarding their claims, as a group, compared to the claims actually tried to the jury. That procedure cannot focus upon such issues as individual causation, but ultimately must accept general causation as sufficient . . . . Commonality among class members on issues of causation and damages can be achieved only by lifting the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation and discrete injury.<sup>91</sup>

The *Fibreboard* court's focus on the individual and the claims the individual could assert suggests that the court used the common right approach to class definition. Judge Higgenbotham's concerns revolved around the discrete members of the group. Since each person could not assert the exact same right as every other person, the court concluded that the group was not sufficiently cohesive for class status.<sup>92</sup> Realistically, in the area of mass tort class certification, every individual will assert a separate bundle of rights. It will

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90. 893 F.2d 706 (5th Cir. 1990).

91. *Id.* at 711-12.

92. Similar reasoning can be found in *In re Northern Dist. of Cal., Dalkon Shield I.U.D. Prod. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983). The *Dalkon Shield* court refused to certify the class:

No single happening or accident occurs to cause similar types of harm or property damage. No one set of operative facts establishes liability. No single proximate cause applies equally to each potential class member and each defendant. Furthermore, the alleged tortfeasor's affirmative defenses (such as failure to follow directions, assumption of the risk, contributory negligence, and statutes of limitations) may depend on facts peculiar to each plaintiff's case.

*Id.* at 853; *see also* *Yandle v. PPG Indus. Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974).

never be possible to certify a mass tort class in a court that follows the common right approach to the pragmatic balancing test to determine if there is a predominance of common questions of law and fact.<sup>93</sup>

Judge Higgenbotham's conclusion that commonality sufficient to constitute predominance can only be achieved by generalizing the claims of each individual plaintiff is consistent with a common right approach. To find the necessary predominance of common questions under the common right approach, a court would look to the rights of the individual plaintiffs. In the *Fibreboard* case, the plaintiff's rights only appeared common on a general level. After closer inspection of the rights in question, it became apparent that the rights were several and distinct. Only by generalizing the rights could the necessary commonality be found. Judge Higgenbotham was unwilling to do this. Thus, in employing the common right approach to the question of predominance, the court refused to certify the class.

Had the court followed the community of interest approach, the analysis would have focused on the claims or rights arising from a common nucleus of operative fact. Examining the group's asserted rights in this manner would have permitted the class members to assert several and distinct rights. The community of interest approach would have focused on whether the plaintiffs' claims arose out of "the same common nucleus of operative facts relating to defendants' conduct and the nature of the asbestos product."<sup>94</sup> Consequently, the community of interest theory would likely have permitted certification in this situation.

### C. The Limited Fund

A number of mass tort cases<sup>95</sup> seek class certification under Rule 23(b)(1)(B).<sup>96</sup> Under this provision, a class action is deemed

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93. Compare mass tort plaintiffs with tenants-in-common. In the latter case, a class could be found under the common right theory since each plaintiff would be asserting a claim based on his shared status against a tortfeasor who injured common property. In contrast, mass tort plaintiffs each have a unique relationship to the tortfeasor although the harm may differ.

94. *Asbestos School Litig.*, 104 F.R.D. at 432.

95. See, e.g., *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973); *Jenkins v. Raymark*, 109 F.R.D. 269 (E.D. Tex. 1985); *In re Agent Orange Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983); *Payton v. Abbott Labs*, 83 F.R.D. 382 (D. Mass. 1979), *vacated on other grounds*, 100 F.R.D. 336 (1983).

96. A class action is maintainable under this provision, if after having satisfied the

appropriate when individual actions might be dispositive of the interests of others. In the mass tort context, the limited fund theory is based on the concern that parties who bring their individual actions may deplete the defendant's resources, leaving no money for future claimants to collect.

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem.<sup>97</sup>

At first blush, the applicability of Rule 23(b)(1)(B) to certify a class when there is a limited fund appears straightforward. However on the class definition level, disparities arise among various courts. These disparities manifest themselves in the nature of the tests adopted by the courts to determine whether a limited fund exists. At present, two types of tests are performed by the courts, a liberal test and a restrictive test.<sup>98</sup> The liberal test correlates to the use of the community of interest theory while the restrictive test

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prerequisites of 23(a):

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

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(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests . . . .

FED. R. CIV. P. 23(b)(1)(B).

97. Prop. FED. R. CIV. P., 39 F.R.D. 69, 101 (1966).

Limited fund class actions are permitted in a wide variety of cases. 1 NEWBERG, *supra* note 88, § 1140. However, the judiciary is reluctant to certify classes in the mass tort scenario. Transgrud, *supra* note 28, at 795. The trend among courts is to permit separate actions to determine the rights of later claimants. *La Mar v. H & B Novelty & Loan Company*, 480 F.2d 461, 467 (1973) ("The success or failure of the plaintiffs in their individual actions will not inescapably alter the rights of others similarly situated.").

98. These terms do not necessary refer to other works or terms from other areas of the law. As such, any similarity between their meanings as defined in this paper and other works is coincidental.

indicates the common right approach by the courts.

The liberal test, which applies a standard of "substantial probability" to determine whether a limited fund exists, originated in *In re Agent Orange Product Liability Litigation*.<sup>99</sup> This case involved the certification of a group of plaintiffs claiming injury from the defoliate "Agent Orange." Under the substantial probability test, the court evaluated the defendant's worth and ability to pay judgments relative to an estimated total value of the group's claims.<sup>100</sup> A substantial probability is applied as the standard of proof in evaluating the significance of the values.<sup>101</sup> Judge Weinstein summarized the substantial probability standard: "the proper standard is whether there is substantial probability — that is less than a preponderance but more than a mere possibility — that if damages are awarded, the claims of earlier litigants would exhaust the defendant's assets."<sup>102</sup>

In contrast, classes seeking certification under the restrictive test for limited funds must demonstrate that "individual action inescapably will alter the substance of the rights of others having similar claims."<sup>103</sup> The Ninth Circuit developed the restrictive test

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99. 100 F.R.D. 718, 724-28 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

100. *Id.* at 727-28. *Cf. Jenkins v. Raymark Indus.*, 109 F.R.D. 269, 276 (E.D. Tex. 1985) (recognizing that the defendant's money may have run out at some point, the court compared the value of the pending cases against the estimated pool of resources), *aff'd*, 782 F.2d 468 (5th Cir. 1986); *In re Asbestos School Litig.*, 104 F.R.D. 422, 437 (E.D. Pa. 1984) (conditionally certifying the class under 23(b)(1)(B) because of the substantial possibility that early punitive damage awards in individual cases would impair later litigants' ability to recover); *vacated on other grounds*, 789 F.2d 996, 1005 (3d Cir. 1986) (vacating the certification because the trial court abused its discretion by failing to make factual findings on the amount and scope of potential punitive damage claims); *Payton v. Abbott Labs*, 83 F.R.D. 382, 389 (D. Mass. 1979) (refusing to certify the class under Rule 23(b)(1)(B) because the plaintiffs failed to prove that the available fund would be insufficient to satisfy all claims), *vacated on other grounds*, 100 F.R.D. 336 (1983).

101. *Agent Orange*, 100 F.R.D. at 725-28.

102. *Id.* at 726.

103. *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 467 (9th Cir. 1973). Although this case was a class action brought under the Truth in Lending Act, the court's Rule 23 analysis has precedential value for all class actions and, in particular, mass tort actions in the Ninth Circuit. *See also In re Northern Dist. of Cal., Dalkon Shield I.U.D. Prod. Liab. Litig.*, 693 F.2d 847, 852 (9th Cir. 1982) (holding that Rule 23(b)(1)(B) certification is proper only when separate punitive damage claims necessarily will affect later claims), *cert. denied*, 459 U.S. 1171 (1983); *McDonnell Douglas Corp. v. U.S. Dist. Court, C.D. of Cal.*, 523 F.2d 1083, 1086 (9th Cir. 1975) (permitting class certification under 23(b)(1)(B) only if separate actions "inescapably will alter the substance of the rights of others having similar claims"), *cert. denied*, 425 U.S. 911 (1976).

in *La Mar v. H & B Novelty & Loan Company*.<sup>104</sup> The *La Mar* court reasoned that by alleging a limited fund, the plaintiffs would be able to bootstrap their motion for certification because any action against a fund has the potential to alter the rights of subsequent litigants simply by depleting the fund.<sup>105</sup> The courts that apply the highly restrictive standard for determination of limited fund appear concerned that a loosely related group of individuals may be able to satisfy the prerequisites of Rule 23(a)(2), thereby allowing them to achieve class status too easily under Rule 23(b)(1)(B). Because the prerequisites in subdivision (a) are not intended to be very demanding standards, most groups can satisfy the provisions, and yet not be very cohesive. However, under the liberal test, satisfaction of those requirements defines the group as a class if a limited fund is found. One method of preventing loosely defined groups from gaining class status is to impose very high standards on the determination of a limited fund, as the restrictive approach has done.

An example of restrictive analysis is found in *In re Northern District of California, Dalkon Shield IUD Products Liability Litigation*.<sup>106</sup> The plaintiffs seeking class certification under Rule 23(b)(1)(B) did not satisfy the prerequisites of subdivision (a).<sup>107</sup> While discussing the group's failure to fulfill the requirements of Rule 23(a), the Circuit Court noted that given the right circumstances, each of the provisions could be satisfied, and class certification under 23(b)(1)(B) might be possible.<sup>108</sup>

104. *La Mar*, 489 F.2d at 467.

105. *Id.*; see also Andrew C. Rose, Note, *Federal Mass Tort Class Actions: A Step Toward Equity and Efficiency*, 47 ALB. L. REV. 1180 (1983). Rose noted:

If individual actions were allowed to proceed in such cases (mass torts), plaintiffs who sued first would deplete the defendant's resources, leaving subsequent plaintiffs without a remedy.

...

In mass tort cases there is often extensive injury to a great number of people and, as a result, the total damages claimed are likely to be enormous. Despite the existence of insurance coverage, the tremendous amount of monetary claims makes the exhaustion of the defendant's financial resources a very real possibility.

[Moreover] [t]he tremendous litigation costs that would be incurred by a defendant if it were forced to defend a multitude of individual tort suits further contributes to the likelihood of a limited fund. Such costs could accelerate the depletion of an already limited fund or create a limited fund where none previously existed.

*Id.* at 1199-1201.

106. 693 F.2d 847 (9th Cir. 1982), cert. denied, 495 U.S. 1171 (1983).

107. *Id.* at 850-51.

108. *Id.* at 851 ("We are not necessarily ruling out the class action tool as a means for

However, reviewing the court's reasoning in assessing whether the prerequisites of 23(a) had been met reveals a reluctance to find that the subsection (a) criteria had been satisfied. Regarding the commonality requirement of Rule 23(a)(2), the court decided that "[i]f commonality were the only problem in this case, it might be possible to sustain some kind of punitive damage class."<sup>109</sup> In connection with Rule 23(a)(3), the court similarly held "typicality alone might not be an insurmountable problem."<sup>110</sup> The court further noted that the adequacy or representation problem could also be resolved by the selection of adequate counsel to replace the resigning counsel.<sup>111</sup> The court pointedly acknowledged the fact that prerequisites can be satisfied given the appropriate facts.<sup>112</sup>

The courts which apply the Ninth Circuit's standard in a limited fund context cite concern that loosely related groups could achieve class status with relative ease under Rule 23(b)(1)(B) as one of the reasons for creating such a high standard for applying that provision. The "bootstrap" effect of the provision in a mass tort context has also led some courts to impose a more stringent standard in determining whether the prerequisites of Rule 23(a) have been satisfied. Courts applying the community of interest theory easily satisfy the 23(a) requirements. Thus, some courts will apply the common right theory to the 23(a) prerequisites to ensure that class certification is not available to loosely related groups under 23(b)(1)(B). Unfortunately, Rule 23 does not provide any guidance on whether the liberal or restrictive test should be applied in assessing certification under 23(b)(1)(B), leaving the courts wide discretion to create differing tests depending on their concerns related to class definition under 23(a), as well as 23(b)(1)(B).

#### D. Preliminary Conclusions

The essence of class definition is the need to develop a framework in which to understand the relationships of a group of people. Such a framework provides structure and coherence for inter-

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expediting multi-party product liability in appropriate cases.").

109. *Id.* at 850 (noting that there were common questions including knowledge as to the product's safety, the information withheld from the public and doctors and the instructions provided).

110. *Id.* (suggesting, however, that typicality could be a "significant" problem, making it difficult to rationalize class treatment for the group).

111. *Id.* at 851.

112. *Id.*

preting whether the characteristics of a group are sufficient to grant certification. As seen earlier, creating such a structure is the result of the highly individual nature of the common law. The common law's emphasis on individual adjudication makes the class action a kind of an anomaly in litigation because of its collective nature. Since the class action must function within an individualist structure, courts developed doctrines to justify the use of a class for litigation. The fundamental assumption of these doctrines is that the more the individual members of a class resemble one another, the more likely class status would be granted.

Amended Rule 23 attempts to describe, in very practical terms, situations appropriate for class action treatment. By providing such practical examples, amended Rule 23, unlike original Rule 23, became susceptible to application under either the common right theory or the community of interest theory. As a result, motions for class certification are subject to the particular theory of class definition subscribed to by the court.

The lack of a single theoretical grounding in amended Rule 23 results in a division of holdings along the lines of the community of interest and common right theories. Of course, the theoretical gap in Rule 23 is not the only explanation for the disparities among the federal circuits in granting or denying class certification. However, the theories do play a fundamental role in determining how courts apply Rule 23's provision.

## V. EXAMINATION OF THE CLASS DEFINITION

In the first four sections, the common right theory and the community of interest theory were treated as separate and distinct from each other. Their development was briefly traced through original Rule 23 and the case law involving amended Rule 23. A more detailed analysis of the common right and community of interest approaches and the perspective in which they are applied is needed to more comprehensively understand the nature of the class definition process itself.

In examining the philosophical underpinnings of the definition process as well as the perspective, or epistemological framework, from which it is understood, the present distinctions shrink in importance. The value of such an analysis manifests itself here in a proposal of a different perspective in which to use the theories. This epistemological perspective will allow for the creation of a more uniform approach to class definition, thus eliminating the



present disparities in the case law.

### A. The Common Right and Community of Interest Structures

Under the common right theory, a court finds class cohesion when multiple parties share and assert the very same rights.<sup>113</sup> All members of the group are in privity with one another by virtue of possession of a common right.<sup>114</sup> The existence of privity permits the group to act as a class because it allows the court to treat all the individuals as a single unit.<sup>115</sup> All parties stand in the same relationship.

The existence of privity allows the group to litigate as a class despite the fact that the group is actually composed of separate individuals. More clearly, privity means each individual is claiming the same right in relation to a common subject matter as all other individuals in the class.<sup>116</sup>

Although a right in relation to a common subject matter is a type of claim, it also functions as a label. The labeling aspects of a right in relation to a common subject matter elucidate much vital information about the class definition process. As a label, a right in relation to a common subject matter encompasses a large number of individual aspects or dimensions about a particular person. To illustrate, an individual who has a right in relation to a subject occupies a particular point in time. As a label, the right defines the person as having a relationship with the subject matter uniquely different from those who do not have the right. Possession of the right also implies the individual has a particular desire regarding the subject matter. In short, possession of a right in relation to a common subject matter has the function of describing, along numerous dimensions, the position of the individual; it describes a person's orientation.

The term "orientation," although descriptive, is unfortunately similar to the term "label" in that both are only useful as a composite of the basic dimensions of the possessor of the right. How-

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113. 1 POMEROY, *supra* note 27, § 255 at 434-35.

114. *Id.* § 251 at 407-408 (noting that the privity relationship was traditionally the fundamental element in allowing an equity court to assume jurisdiction in cases involving multiple plaintiffs and/or defendants).

115. See C.C. Langdell, *A Brief Survey of Equity Jurisdiction: (VII) Creditors' Bills*, 5 HARV. L. REV. 101, 109 (1891) (describing the administration of a decedent's estate in a court of equity where all creditors' claims are satisfied in one proceeding).

116. BLACK'S LAW DICTIONARY 1199 (6th ed. 1990).

ever, the basic characteristics of an individual who claims a right in relation to a common subject matter are the defining terms of the class under the common right theory.

The community of interest approach to determining when a group may be certified as a class functions differently than the common right theory. Where the common right theory identifies and orients a person based on a right in relation to a common subject matter, the community of interest structure examines the questions arising from a common subject matter. Using questions in relation to a common subject matter fundamentally changes the relationships of the individuals constituting the group. Most importantly, no privity exists among the individuals in the community of interest approach. Nonetheless, the theory serves to describe a person's orientation with regard to a certain subject matter. The common questions thus act as the unifying force, which binds all members of the group.

Similar to the common right structure, the questions in relation to the subject matter are, at bottom, a label which describes or communicates information. They inform others about many discrete aspects of the person. When a person is found to have questions in relation to a common subject matter, that individual's relationship to others is identified, and it is possible to determine whether class certification is appropriate based on that orientation.

The characteristics contained within any particular orientation, whether a right in relation to a common subject matter or questions in relation to a common subject matter, are the building blocks of a class. People having the same orientation, by virtue of their possession of the same right in relation to a subject matter or question in relation to a common subject matter, exhibit the same characteristics. The similarity provides the cohesion and permits the individuals to litigate as a class based on their similarity to one another. That is, they are closely related enough to act as one in litigation.<sup>117</sup> The remaining difficulty is understanding the nature of these basic characteristics.

#### B. Epistemological Foundation

Arriving at the basic characteristics which ultimately describe a

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117. See *supra* text accompanying notes 16-22 (analyzing the need for individuals to be as closely related to one another as possible in order to litigate in the highly individualized common law structure).

person's orientation is accomplished by means of "analysis." The concept of "analysis as tool" is used to break down complex ideas into simpler ones. For example, analysis was applied to the term "right in relation to a subject matter" to determine its contents, or more precisely, the simpler terms which combine to define it. The simpler terms are merely the discrete characteristics which describe the person possessing it. Understood in this manner, the process of definition is essentially analysis of compound ideas.<sup>118</sup> Consequently, all labels are logically superfluous since the basic characteristics may always be substituted for compound ideas.<sup>119</sup> In this sense, privity is actually an abbreviation for a complex or bundle of ideas elucidated through analysis.<sup>120</sup> The importance of the conception of definition as analysis is that it is premised on the idea that, at some point, basic terms are arrived at which cannot be further defined through analysis.<sup>121</sup> These basic terms are the building blocks upon which an alternative framework for definition is constructed.

### C. Theory of Family Resemblances

Ludwig Wittgenstein investigated how concepts and ideas are recognized and understood, creating what he called the "Theory of Family Resemblances." He explored the essence or nature of a basic concept,<sup>122</sup> for example, a legal class.<sup>123</sup> Definition as analysis would hold that individuals are part of a class if they have some common characteristic. All individuals possessing a common

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118. See BERTRAND RUSSELL, *THE PRINCIPLES OF MATHEMATICS* 27 (2d ed. 1937) (distinguishing "definition" in philosophy from mathematics by positing that in philosophy definition is "an analysis of the idea to be defined into constituent ideas . . . whereas in mathematics it is possible to define terms which are not concepts").

119. The same is true for the community of interest approach. Analysis is used to determine the content or definition of questions in relation to a common subject matter. The separate characteristics of a person labeled as having questions in relation to a common subject matter could always be substituted for the label without any loss of meaning. Consequently, questions in relation to a common subject matters merely describe the bundle of individual characteristics of the person.

120. 1 GORDON P. BAKER & P.M.S. HACKER, *WITTGENSTEIN: UNDERSTANDING AND MEANING* 185-86 (1980) (believing that this conception of definition as analysis is an essential and almost unquestioned principle of classical or orthodox Western philosophy).

121. *Id.* at 186-89.

122. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 31 (1953).

123. Since Wittgenstein discussed concepts generally, his concern with the legal concept of a class was probably quite low. However, a class is used for relevant illustrative purposes.

characteristic or set of characteristics of a class creates the class. The individuals constitute a class because the class is defined as those individuals containing common discrete characteristics determined either under the common right or community of interest theories. However, the class is defined as those people possessing the required characteristics. Consequently, the defining process is, at bottom, circular.

Wittgenstein argued that basic concepts "have no one thing in common which makes us use the same word for all, — but that they are *related* to one another in many different ways. And it is because of this relationship, or these relationships, that we call them 'language.'"<sup>124</sup> Wittgenstein explained that a series of language games are all identifiable as language, not because the games had common traits but because of the relationships between and among the different games.<sup>125</sup> Recognizing the difficulty of understanding this theory in the abstract, Wittgenstein illustrated by analogizing to the basic concept of a game. He compared a number of games such as "board-games, card-games, ball-games, Olympic games, and so on,"<sup>126</sup> and asked himself what permitted recognition of an activity as a game. Asserting that nothing is common to all games, he argued that defining a game is actually accomplished by recognition of a complicated series of similarities and relationships with other activities.

Look for example at board-games, with their multifarious relationships. Now pass to card-games; here you find many correspondences with the first group, but many common features drop out, and others appear. When we pass next to ball-games, much that is common is retained, but much is lost.—Are they all 'amusing'? Compare chess with noughts and crosses. Or is there always winning and losing, or competition between players? Think of patience. In ball-games there is winning and losing; but when a child throws his ball at the wall and catches it again, this feature has disappeared.<sup>127</sup>

Applying Wittgenstein's epistemology, the definition of a class does not lie in locating the individual common properties which

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124. WITTGENSTEIN, *supra* note 123.

125. *Id.*

126. *Id.*

127. *Id.* at 31-32.

underlie the concept of a class. Instead, an individual is a member of a class by virtue of having a number of overlapping similarities, and relationships. That is, the web of individual common properties, not the individual common properties themselves, provide the definition. No one basic dimension, characteristic or set of characteristics is discretely sufficient to make an individual a member of the class. In practice, a group is actually recognized as a class, under common right or community of interest theories when the individuals exhibit numerous similar characteristics.

However, under the family resemblance theory no designated characteristic or set of characteristics defines the class. The cumulative effect of the relationships is what matters.<sup>128</sup> Because the definition of a basic concept is found in the web of similarities and relationships of the basic characteristics which are included in a class, no precise boundaries exist defining the class. Only an explanation of the class is possible.<sup>129</sup>

A more concrete explanation will elucidate the point. A group seeking to litigate as a class is a collection of individuals. Since the individuals are separate and discrete entities, all the particular characteristics or orientation of any one person are not necessarily present in any other person in the group. A careful inspection of the characteristics of each person would reveal differences in each person's orientation. For example, not all members will actually occupy a particular point in time with respect to a right in relation to a common subject matter. Some individuals will acquire their claims at different moments. Also, all individuals of the group will not have the exact desires or wants in relation to the subject matter of the claim. Under family resemblance theory, individuals form a class through the manifestation of a network or web of similarities associated with a class.<sup>130</sup> It is the relationship among the charac-

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128. Under the theory of family relationships, it is incorrect to conclude that the web, itself, is the defining element of the class. For example, focusing on the nature of the web of relationships as distinguishing a group from a class misperceives the theory of family resemblances. Focusing on the web of relationships is the same as using a right in relation to a common subject, since it can always be broken down into the individual characteristics which comprise it. Instead, the degree to which the characteristics overlap and combine gives rise to the definition; that is, the dynamic relationships among the characteristics defines a class. *Id.* at 36.

129. *See id.*

130. The more similarities and relationships among the individuals, the greater the recognition of a class. Since no firm boundary is possible, the fewer the relationships exhibited, the less likely a class will be found. However, no defining point is possible as is assumed under common right theory.

teristics which provides the definition. If two people are described as having a right in relation to a subject matter, they possess a similar web of relationships among a bundle of the characteristics. However, possession of the very same characteristics is merely fortuitous and highly unlikely given the distinct qualities of the individuals.

The theory of family resemblances is useful to break a label or definition into its component parts. However, there is no precise list of basic characteristics which constitute a right in relation to a common subject matter or questions in relation to a common subject matter. Instead, Wittgenstein's theory points to the web of relationships among a bundle of basic characteristics which permits recognition of a person as either possessing or not the right in relation to a common subject matter or questions in relation to a common subject matter.

The common right theory assumes that the privity relationship describes each individual as a class member because to be in privity is to have a discrete set of characteristics establishing a particular relationship between the parties. From family resemblance theory, privity actually serves as a label for a web of varying degrees of similarities among the class members. However, privity is not capable of isolating all the characteristics of each person which are common to the class. Instead, privity among the members of a class is a shorthand term for a great number of overlapping relationships.

Similar to common right theory, the community of interest theory attempts to define a class by discretely defining the orientation of each individual in relation to a subject matter. Under community of interest, the orientation is determined by the common questions which arise from the subject matter. Thus, the theoretical differences in how each theory defines a class exist only in what characteristics are thought to define the class. The distinctions between these theories fade under a family resemblance theory.

#### D. Similarities in the Two Theories

Understanding both the common right theory and the community of interest theory from a family resemblance perspective, the relevance of the differences in how a person's orientation is used have only a quantitative meaning. Each theory purports to work by defining a set of characteristics which will create a class. However, the family resemblance theory demonstrates that it is not the dis-

crete characteristics which define the class. Instead, it is the relationships among numerous overlapping characteristics. More precisely, individuals are related to one another in degrees depending on the number of overlapping qualities they exhibit.

Both the right in relation to a common subject matter and the question in relation to a common subject matter only describe or label the basic characteristics. The manner in which these basic qualities are related to one another actually determines whether the individuals are sufficiently similar to be recognized as a class. However, the network of relationships extends to all characteristics exhibited by the individuals. All members of a class possess, to a greater or lesser degree, similar overlapping qualities. Such is the case whether the common right or the community of interest theory is employed to determine whether to grant or deny a motion for class certification. Thus, by explaining a class through reference to the network of basic characteristics, the common right and community of interest theories collapse into one, and are, in essence, opposite sides of the same coin.

Employing the family resemblance perspective, the separate characteristics required by the two theories are not relevant to defining the class. As noted above, the network of overlapping relationships justifies recognition of the class. However, there is no precise boundary determining at what point enough relationships exist to term the group of individuals a class. Consequently, the more relationships found in common the more likely a class exists; conversely, the fewer common relationships, the less likely a class will be recognized. Thus, the common right and community of interest justifications only have a quantitative meaning, and as a result classes certified under the theories are not qualitatively different. The two primary theories only differ in the degree to which the basic characteristics match and differ despite their overt focus on a right in relation to a common subject matter for the common right theory and the questions in relation to a common subject matter in the community of interest theory.

This similarity in the theories understood from the family resemblance perspective is useful for understanding class certification. Applying the theory of family resemblances shows that the disparities in judicial decisions regarding class certification are unnecessary and, to a large degree, meaningless. The commonality located by the common right and the community of interest theories stems from the same origin — the greater or lesser degree of relationships among the network of relationships. Thus, all the effort con-

sumed by the courts in applying either theory and evaluating whether the group of individuals satisfies the theory is not relevant or useful. It is an artificial construct created by the courts based on a false premise — that a precise set of characteristics can define when individuals are sufficiently related to litigate as a class.

#### E. Considerations for Certification

The importance of the family resemblance lies in the accuracy with which it describes reality. It recognizes the limitations inherent in the defining process and, ultimately, the interconnectedness of the common right and community of interest theories. Although this perspective appears to make the certification process appear unstructured, the theory of family resemblances actually provides a uniform theoretical framework with which to conduct more accurately the certification evaluation.

The basis of the class certification must be an awareness of how a class is actually recognized, as elucidated by the family resemblance theory. The focus must be on the dynamic quality among the various attributes of the individuals, which is what permits recognition of the person as a member of the class or distinguishes him from the group. Implicit in such a focus is the recognition that individuals will not be exactly alike in all relevant manners. In particular, differences will exist among class members in their orientation. Nonetheless, paying attention to the web of relationships will ground Rule 23 in a unitary theoretical framework and avoid the numerous contradictory decisions with regard to class certification.<sup>131</sup>

Of course in practical terms, applying the theory of family resemblances is much more difficult. The difficulty, however, is outweighed by the accuracy which it introduces in the certification process and the resulting elimination of conflicting decisions. A court considering a motion for certification must examine the degree to which the individuals' characteristics overlap, relating them in a cohesive manner. The court should not focus on the discrete traits of the individuals but the manner in which the attributes relate to one another. Using such a method in the certification procedure will lead courts to make conclusions regarding the cohesiveness of the group, and not merely concentrate on whether all individuals have the same characteristics.

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131. See *supra* note 3.



For example, assume that a number of women who claim injury from use of the Dalkon Shield file a motion for certification. Instead of simply looking for a common right or common questions, the court should look at the group of women as a whole and examine the similarities and relationships shared by the putative class that allow these individuals to call themselves a group. In considering the motion, the court should examine such characteristics as when the claims were acquired, how they arose, whether they arise in the same manner, whether they involve the same product, etc.

The court should explore these basic traits and the individuals' relationship to them. The evaluation needs to concentrate on the degree of similarity among all the traits and those women possessing them. Some women's claims will arise at the same time and some will have been acquired in the same manner. Other women's claims will arise later or earlier, but in the same manner, and still other women's claims will arise at the same time and in the same manner, but as the result of a different product. These factors as a whole, or as a network of relationships, must guide the decision to certify the class or not. Thus, certain women will be sufficiently similarly situated to justify class treatment while others will be distinguishable from the group and therefore not included in the class.

The outcome, grant or denial of certification, is not the issue. The importance of this analysis lies in the single theoretical perspective guiding the application of Rule 23. By using the theory of family resemblances, courts will always be following a single rationale for certification instead of some courts using one justification while others use another. As a result, Rule 23 will have a single framework for application and the present disparities will disappear, or at least, shrink in significance.

## VI. CONCLUSIONS

At present, the case law surrounding class certification, particularly in the area of mass tort class actions, is comprised of many of conflicting decisions. Examination of the judicial opinions indicates the confusion is not random, but actually related to the theory upon which the court defines a class. The two theories for understanding class definition, common right and community of interest, came into use as a result of the very practical terms in which amended Rule 23 was drafted.

The amendments to Rule 23 eliminated the theoretic grounding found in the original rule. Although the changes remedied other difficulties with the original rule, new difficulties, on the class definition level were created. The practical terms of the amended rule allow the courts to approach the class certification process from their own perspectives, giving the courts' perspectives determinative effect on the certification process.

The family resemblance theory, as an alternative, is a better method of understanding when a group is a class. It more fully describes how a class is recognized and reveals the logical circularity present in the certification process currently used.

Adopting the proposed theory as the basis for recognizing classes will provide a more uniform approach to class certification. By requiring courts to examine fully the network of relationships which permit recognition of a group, courts avoid the likelihood of Rule 23 being applied in two distinct manners. Although the family resemblance theory may require increased judicial discretion in determining at what point there is sufficient similarity to certify a class, the gains stemming from the increased coherence in application of Rule 23 offset the discretion allowed individual judges. The uniform structure for evaluation of class certification proposed here permits courts to focus on other troubling aspects of class actions and avoid disparate theoretical approaches.

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